

1 affirmed. The Court has taken the parties' Joint Stipulation under
2 submission without oral argument.

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4 **SUMMARY OF ADMINISTRATIVE PROCEEDINGS**

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6 Plaintiff filed his application for DIB on January 9, 2004.
7 (Administrative Record ("A.R.") 73-76.) Plaintiff claims to have been
8 disabled since June 17, 2002, due to back and foot pain. (A.R. 21, 86,
9 263.)

10
11 The Commissioner denied Plaintiff's claim for benefits initially
12 and upon reconsideration. (A.R. 18.) On September 19, 2005, Plaintiff,
13 who was represented by counsel, testified at a hearing before
14 Administrative Law Judge Gail Reich ("ALJ"). (A.R. 258-78.) On
15 November 23, 2005, the ALJ denied Plaintiff's claim, and the Appeals
16 Council subsequently denied Plaintiff's request for review of the ALJ's
17 decision. (A.R. 7-9, 18-23.)

18
19 **SUMMARY OF ADMINISTRATIVE DECISION**

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21 In her November 23, 2005 written decision, the ALJ found that
22 Plaintiff: meets the non-disability requirements for a period of
23 disability and disability insurance benefits; and has not engaged in
24 substantial gainful activity during the period at issue. (A.R. 20.)
25 The ALJ determined that Plaintiff has severe impairments consisting of:
26 degenerative disc disease of the lumbar sacral spine; mild, right side
27 radiculopathy; and left plantar fasciitis. (*Id.*) However, the ALJ
28 concluded that Plaintiff does not have an impairment or combination of

1 impairments listed in, or medically equivalent to an impairment listed
2 in, Appendix 1, Subpart P, Regulation No. 4. (*Id.*) In addition, the
3 ALJ found that Plaintiff is unable to perform his past relevant work as
4 a forklift operator, is "closely approaching advanced age," and has a
5 "high school education and is able to communicate in English." (A.R.
6 22.)

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8 The ALJ determined that Plaintiff "has the residual functional
9 capacity to lift and/or carry 30 pounds occasionally and 15 pounds
10 frequently. He can stand and/or walk for 6 hours of an 8-hour workday
11 and sit for 6 hours." (A.R. 20.) The ALJ also found that Plaintiff
12 should: be precluded from climbing ladders and can occasionally climb
13 stairs, stoop, kneel, crawl, and balance; and avoid concentrated
14 exposure to extreme cold, vibrations, and fast moving machinery. (*Id.*)
15 Based on this residual functional capacity assessment and considering
16 Plaintiff's age, education, and work experience, the ALJ found that
17 Plaintiff was able to perform jobs that exist in significant numbers in
18 the national economy. (A.R. 22.) Accordingly, the ALJ concluded that
19 Plaintiff was not disabled within the meaning of the Social Security Act
20 during the time period at issue. (A.R. 23.)

21 22 STANDARD OF REVIEW

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24 This Court reviews the Commissioner's decision to determine
25 whether it is free from legal error and supported by substantial
26 evidence. Smolen v. Chater, 80 F.3d 1273, 1279 (9th Cir. 1996). The
27 Commissioner's decision must stand if it is supported by substantial
28 evidence and applies the appropriate legal standards. Saelee v. Chater,

1 94 F.3d 520, 521 (9th Cir. 1996). Substantial evidence is "more than a
2 mere scintilla but less than a preponderance -- it is such relevant
3 evidence that a reasonable mind might accept as adequate to support the
4 conclusion." Moncada v. Chater, 60 F.3d 521, 523 (9th Cir. 1995).

5
6 Although this Court cannot substitute its discretion for that of
7 the Commissioner, this Court nonetheless must review the record as a
8 whole, "weighing both the evidence that supports and the evidence that
9 detracts from the [Commissioner's] conclusion." Desrosiers v. Sec'y. of
10 Health and Human Servs., 846 F.2d 573, 576 (9th Cir. 1988); see also
11 Jones v. Heckler, 760 F.2d 993, 995 (9th Cir. 1985). "The ALJ is
12 responsible for determining credibility, resolving conflicts in medical
13 testimony, and for resolving ambiguities." Andrews v. Shalala, 53 F.3d
14 1035, 1039-40 (9th Cir. 1995). This Court must uphold the
15 Commissioner's decision if it is supported by substantial evidence and
16 free from legal error, even when the record reasonably supports more
17 than one rational interpretation of the evidence. *Id.* at 1041; see also
18 Morgan v. Comm'r. of Social Sec. Admin., 169 F.3d 595, 599 (9th Cir.
19 1999); Flaten v. Sec'y., 44 F.3d 1453, 1457 (9th Cir. 1995).

20 21 DISCUSSION

22
23 Plaintiff raises one issue. He alleges that the ALJ's
24 determination at step five of the sequential evaluation was not
25 supported by substantial evidence. (Joint Stipulation ("Joint Stip.")
26 at 2.)

1 **A. The ALJ Erred At Step Five Of The Sequential Procedure.**

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3 Plaintiff contends that the ALJ erred by applying 20 C.F.R. Part
4 404, Subpt. P, App. 2, Rule 202.14 to find that Plaintiff was not
5 disabled. (Joint Stip. at 4.) Plaintiff also contends that the ALJ
6 erroneously rejected his argument that Plaintiff was illiterate and that
7 the applicable grid rule was Rule 202.09, which, if applied by the ALJ,
8 would have directed a finding of disability. (*Id.*)

9
10 At step five of the sequential procedure,² the burden shifts from
11 the claimant to the ALJ to show that the claimant is able to perform
12 other work that exists in the national economy. Osenbrock v. Apfel, 240
13 F.3d 1157, 1162 (9th Cir. 2000). The ALJ can meet this burden by either
14 taking the testimony of a vocational expert or by referring "to the
15 Medical-Vocational Guidelines at 20 C.F.R. pt. 404, subpt. P, app. 2."
16 *Id.* Medical-Vocational Guidelines, which are commonly called "grids,"
17 are tables that are used "for determining the availability and number of
18 suitable jobs for a claimant." Lounsbury v. Barnhart, 468 F.3d 1111,
19 1114 (9th Cir. 2006) (citations omitted). The grids categorize jobs by
20 their physical-exertional requirements. *Id.* "A claimant's placement
21 with the appropriate table is determined by applying a matrix of four
22

23 ² "The Ninth Circuit articulated the five-step sequential
24 process for determining whether a claimant is 'disabled' in Tackett v.
25 Apfel, 180 F.3d 1094, 1098-99 (9th Cir. 1999)." Lounsbury v. Barnhart,
26 468 F.3d 1111, 1114 (9th Cir. 2006). Step one determines whether the
27 claimant is engaged in a substantially gainful activity; step two
28 assesses whether the claimant has medically determinable impairments
that are severe; step three determines whether the claimant's
impairment(s) "meet or equal" an impairment listed in the regulations;
step four assesses the claimant's residual functional capacity, and
determines whether the claimant can do his/her past relevant work; and
step five determines whether the claimant can do any other work. *Id.*

1 factors identified by Congress - a claimant's age, education, previous
2 work experience, and physical ability." *Id.* at 1114-15. The grids
3 direct a finding of either "disabled" or "not disabled" based on a
4 combination of the four factors. *Id.* at 1115.

5
6 In the present case, the ALJ used grid Rule 202.14 (A.R. 23),
7 which directs a finding of no disability if a claimant has a residual
8 functional capacity for light work³ and: 1) is "closely approaching
9 advanced age";⁴ 2) has a high school education or more; and 3) has
10 previously done skilled or semi-skilled work with no transferable
11 skills. 20 C.F.R. Part 404, Subpt. P, App. 2, Rule 202.14. Plaintiff
12 argues that Rule 202.14 is inapplicable, because he is "illiterate"
13 within the meaning of the grid rules. (Joint Stip. at 4.) Plaintiff
14 further argues that the grid rule applicable in his case is Rule 202.09
15 (Joint Stip. at 5), which directs a finding of disability if a claimant
16 has a residual functional capacity for light work and: 1) is "closely
17 approaching advanced age"; 2) is illiterate or unable to communicate in
18 English; and 3) has previously done unskilled work or no work at all.
19 20 C.F.R. Part 404, Subpt. P, App. 2, Rule 202.09.

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21 Addressing Plaintiff's counsel's argument, the ALJ stated:

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23 [Plaintiff's] representative suggested that the claimant
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26 ³ "Light work" involves "lifting no more than 20 pounds at a
time with frequent lifting or carrying of objects weighing up to 10
pounds." 20 C.F.R. § 404.1567(b).

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28 ⁴ "Closely approaching advanced age" denotes an age of 50-54.
20 C.F.R. Part 404, Subpt. P, App. 2, § 202(d).

1 should meet Rule 202.09 because he is illiterate in English.
2 The undersigned finds that the claimant can communicate in
3 English and can read and write in Spanish. Rule 202.09
4 requires both illiterate and unable to communicate in English,
5 which is not the case.

6
7 (A.R. 22.)
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9 Thus, the ALJ understood Rule 202.09 to be applicable only upon a
10 finding of both a claimant's illiteracy in any language and an inability
11 to communicate in English. However, in two decisions, the Ninth Circuit
12 has interpreted the key phrase of Rule 202.09 at issue here -- which
13 requires that a claimant must be "illiterate or unable to communicate in
14 English" -- as requiring that the claimant must be **either** illiterate in
15 English **or** unable to communicate in English **or** both. In Chavez v.
16 Dep't. of Health & Human Servs., 103 F.3d 849 (9th Cir. 1996), the Ninth
17 Circuit explained that, for purposes of the Social Security regulations
18 and rules, the term "illiteracy": "is defined as the 'inability to read
19 or write'"; and "means illiterate in English." *Id.* at 852 (citing 20
20 C.F.R. § 404.1564(b)(1) and (5) and interpreting Rule 201.23, which
21 contains the same key phrase as Rule 202.09). The Ninth Circuit further
22 explained that the phrase "ability to communicate in English" means
23 "'the ability to speak, read and understand English.'" *Id.* (citing to
24 20 C.F.R. § 404.1564(b)(5)).
25

26 In a subsequent decision, the Ninth Circuit explained that Chavez
27 held that a claimant is "illiterate or unable to communicate in English"
28 if he or she is "either illiterate in English or unable to communicate

1 in English or both.” Silveira v. Apfel, 204 F.3d 1257, 1261 and n.13
2 (9th Cir. 2000) (*per curiam*). In Silveira, the claimant conceded he
3 could communicate in English, but asserted he could not read or write in
4 English. The district court found that this concession precluded
5 application of the grid rule urged by the claimant, which contained the
6 same language at issue here and would have dictated a finding of
7 disability had it been applied. The Ninth Circuit held that this
8 finding was erroneous, given Chavez’s holding. *Id.* Because the ALJ
9 failed to make an express finding about whether or not the claimant was
10 literate in English, and the administrative record was ambiguous
11 regarding the claimant’s reading and writing abilities in English, the
12 Ninth Circuit remanded the case to the Commissioner for an express
13 finding on the issue of the claimant’s literacy in English. *Id.* at
14 1262.

15
16 Here, the ALJ did not specifically find that Plaintiff was
17 illiterate in English. However, by explicitly finding that Plaintiff
18 can communicate in English and read and write in Spanish and that, as a
19 result, Rule 202.09 is inapplicable, without addressing Plaintiff’s
20 ability to read and write in English, the ALJ impliedly found that
21 Plaintiff is unable to read and write in English. (A.R. 22.) Given the
22 ALJ’s construction of Rule 202.09 (*viz.*, as requiring illiteracy in *all*
23 languages), had she believed Plaintiff capable of reading and writing in
24 English, the ALJ certainly would have said so as a basis for finding
25 Rule 202.09 to be inapplicable. Indeed, the record supports the ALJ’s
26 implicit finding. In his Disability Report, Plaintiff answered “No” to
27 the question, “Can you write more than your name in English?” (A.R.
28 86.) At the hearing, Plaintiff’s attorney advised the ALJ that

1 Plaintiff cannot write in English and "does read, but very little."
2 (A.R. 277.) Finally, the record shows that Plaintiff completed his
3 education in Mexico. (A.R. 132, 234.) Although this fact in itself is
4 not conclusive evidence that Plaintiff cannot write in English, it is
5 consistent with and supports other evidence of record regarding
6 Plaintiff's inability to write in English. Thus, the record contains
7 substantial evidence supporting a conclusion that Plaintiff cannot write
8 in English, and apparently has little English reading ability as well,
9 which in turn means that he is illiterate under the Ninth Circuit's
10 interpretation of the grid rules, which this Court must follow.

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12 In light of this conclusion, it is clear that the ALJ committed
13 legal error by misconstruing the requirements of Rule 202.09, and as a
14 result, the ALJ did not apply the correct grid rule to Plaintiff's case.
15 Hence, since the record supports a finding that Plaintiff is illiterate
16 in English, he meets the criterion of "illiterate or unable to
17 communicate in English" set out in the Rule 202.09. Further, since
18 Plaintiff meets all other criteria⁵ under Rule 202.09, he must be found
19 to be disabled, because Rule 202.09 directs such a finding. Thus, the
20 record contains substantial evidence to support a finding that Plaintiff
21 is disabled based upon application of the grids.

22
23 Defendant argues that, even if the ALJ misconstrued Rule 202.09,
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25 ⁵ Although the ALJ did not make a specific finding regarding
26 Plaintiff's job skill level, the ALJ did find that "transferability of
27 job skills [was] not material to the determination of disability because
28 of [Plaintiff's] age." (A.R. 22.) Thus, Plaintiff meets the other
three criteria of Rule 202.09, because the ALJ found that Plaintiff was
limited to light work, "closely approaching advanced age," and cannot
perform his past relevant work. (*Id.*)

1 there was no reversible error, because the ALJ properly relied on the
2 testimony of a Vocational Expert ("VE") at Step Five after finding that
3 Plaintiff had both exertional and non-exertional impairments. (Joint
4 Stip. at 5-6.) Defendant's argument is unpersuasive.

5
6 In Cooper v. Sullivan, 880 F.2d 1152, 1155 (9th Cir. 1989), the
7 Ninth Circuit held that if a claimant has only exertional limitations,⁶
8 the ALJ must refer to the grids to establish whether the claimant is
9 disabled. Where the claimant suffers from both exertional and non-
10 exertional impairments, the grids must be consulted first to determine
11 whether a finding of disability can be based on the exertional
12 impairments only. *Id.* However, "if the exertional impairments alone
13 are insufficient to direct a conclusion of disability, then further
14 evidence and analysis are required." *Id.* As the Ninth Circuit
15 explained in Lounsbury, *supra*, the Commissioner cannot rely solely on
16 the grids if a claimant has non-exertional impairments or a combination
17 of exertional and non-exertional impairment, because the grids do not
18 automatically establish the existence of jobs for a particular claimant
19 and, thus, "may not be used to direct a conclusion of *nondisability*."
20 468 F.3d at 1116 (emphasis in original).

21
22 However, when the grids clearly direct a finding of disability,
23 "that finding must be accepted by the Secretary." Cooper, 880 F.2d at
24 1157. "This is so whether the impairment is exertional or results from
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26 ⁶ Exertional limitations are strength related limitations such
27 as limitations in sitting, standing, walking, lifting, carrying,
28 pushing, and pulling. Non-exertional limitations are non-strength
related limitations such as mental, sensory, postural, manipulative, and
environmental. Cooper, 880 F.2d at 1156 n.6-7 (citations omitted).

1 a combination of exertional and nonexertional limitations." *Id.*; see
2 also Lounsbury, 468 F.3d at 1115-16. "In other words, where a person
3 with exertional and non-exertional limitations is 'disabled' under the
4 grids, there is no need to examine the effect of the non-exertional
5 limitations." *Id.* at 1116.

6
7 Here, the ALJ used the testimony of the VE, because the ALJ
8 improperly applied Rule 202.14, rather than Rule 202.09, and found that
9 Plaintiff, who had a combination of exertional and non-exertional
10 impairments, was not disabled under the grids. (A.R. 23.) Had the ALJ
11 applied the correct rule, *i.e.*, Rule 202.09, she would have been obliged
12 to find Plaintiff disabled under the grids, and therefore, there would
13 have been no need for VE testimony. Thus, neither substantial evidence
14 nor Ninth Circuit precedent supports Defendant's argument that the ALJ
15 properly relied on VE testimony to find Plaintiff not disabled.

16
17 **B. Remand For An Immediate Award Of Benefits Is Warranted.**

18
19 Plaintiff contends that, because the record contains substantial
20 evidence to support a conclusion that he is disabled, the case should be
21 remanded for an immediate award of benefits. (Joint Stip. at 8.)

22
23 The decision whether to remand for further proceedings or simply to
24 reverse and award benefits is within the Court's discretion. Harman v.
25 Apfel, 211 F.3d 1172, 1178 (9th Cir. 2000); McAllister v. Sullivan, 888
26 F.2d 599, 603 (9th Cir. 1989). However, where a remand would simply
27 delay the payment of benefits, reversal and an award of benefits is
28 appropriate. *Id.* As the Ninth Circuit has repeatedly observed, when

1 the record is fully developed and a remand for further administrative
2 proceedings would serve no purpose, the Court should reverse and remand
3 for an award and payment of benefits. See, e.g., Benecke v. McCarthy,
4 379 F.3d 587, 593 (9th Cir. 2004); Lester v. Chater, 81 F.3d 821, 834
5 (9th Cir. 1995); Smolen, 80 F.3d at 1292.

6
7 That observation governs here. The record here is fully developed,
8 and there are no outstanding factual issues. The ALJ interpreted Rule
9 202.09 in a manner contrary to controlling Ninth Circuit precedent, and
10 had the Rule been applied properly, a finding of disability would have
11 been, and indeed was, required. Accordingly, the Commissioner has
12 failed to meet his burden at Step Five. There is no legitimate reason
13 for further delay or administrative proceedings on this issue.
14 Accordingly, this case should be reversed and remanded for the payment
15 of benefits.

16 17 **CONCLUSION**

18
19 For the reasons stated above, the denial of benefits is REVERSED,
20 and this case is REMANDED for an immediate award of benefits consistent
21 with this Memorandum Opinion and Order. Judgment shall be entered
22 reversing the decision of the Commissioner, and remanding the matter for
23 an immediate award of benefits consistent with this Memorandum Opinion
24 and Order.

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1 IT IS FURTHER ORDERED that the Clerk of the Court shall serve
2 copies of this Memorandum Opinion and Order and the Judgment on counsel
3 for Plaintiff and for Defendant.

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5 **LET JUDGMENT BE ENTERED ACCORDINGLY.**

6 DATED: August 23, 2007

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8 /s/
MARGARET A. NAGLE
UNITED STATES MAGISTRATE JUDGE
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